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No. 84-1010

In The
Supreme Court of the United States
October Term, 1984

LYDIA B. CHAMPION, et al.,
Petitioners,

v.

GEORGE DEUKMEJIAN, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS 1

BRIEF AMICUS CURIAE OF H. PAUL LILLEBO IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 5

INTEREST OF AMICUS 5

OPINION BELOW 5

SUMMARY OF ARGUMENT 6

ARGUMENT

I. PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE WHEN A FACIAL ATTACK IS MADE ON AN AGENCY SHOP STATUTE 6

II. THE CALIFORNIA COLLECTIVE BARGAINING STATUTE IS UNCONSTITUTIONAL ON ITS FACE 9

A. The California Statute Authorizes Collection and Expenditure of Agency Shop Fees for Political Activities 10

B. The California Statute Authorizes Collection and Expenditure of Agency Shop Fees for Political Lobbying Purposes 11

CONCLUSION 15

TABLE OF AUTHORITITES CITED

Pages

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 10, 11, 12, 13, 14

American Federation of State, County, and Municipal Employees v. State of Washington, 578 F. Supp. 846 (W.D. Wash. 1983) 14

Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113 (1963) 6, 7, 10

Champion v. State of California, 738 F.2d 1082 (9th Cir. 1984) 2, 5, 6

County of Washington v. Gunther, 452 U.S. 161 (1981) 14

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 8

Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, — U.S. —, 104 S. Ct. 1883 (1984) 9, 10, 11

Elrod v. Burns, 427 U.S. 347 (1976) 8

International Association of Machinists v. Street, 367 U.S. 740 (1961) 6, 7, 8, 9, 10, 15

Little Rock and Fort Smith Railway v. Worthen, 120 U.S. 97 (1887) 8

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 10, 11

Woodruff v. Parham, 75 U.S. 123 (1869) 8

TABLE OF AUTHORITIES CITED—Continued

Pages

STATUTES

California Government Code § 3515 2
§ 3515.8 ..... 1, 3, 7, 8, 9, 10, 11, 13, 14
§ 3517 ..... 12, 13
§ 3517.5 12
§ 3517.6 ..... 2, 12, 13
§ 19815.4(g) 12, 13
§ 19844 12
§ 19851 12
§ 19856 12
§ 19859 12

CALIFORNIA CONSTITUTION

California Constitution, Art. IV, § 12 12

UNITED STATES CONSTITUTION

First Amendment 10, 11, 12, 13, 14, 15
Fourteenth Amendment 12, 13

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This motion of H. Paul Lillebo for leave to file the annexed brief amicus curiae in support of the petition for writ of certiorari is respectfully made pursuant to Rule 36 of the Supreme Court. Consent to the filing of this brief has been obtained from counsel for petitioners and has been lodged with the clerk of this Court. Counsel for respondents has refused consent.

H. Paul Lillebo is one of 210 named plaintiffs challenging the constitutionality of California Government Code § 3515.8 in the California courts. *Lillebo v. Cory,* No. 311329 (Sacramento County Superior Court, filed May 2, 1983). Every plaintiff in that action is a California state

employee and is compelled to pay agency shop fees pursuant to California Government Code § 3515, as are the petitioners in the present case. Neither petitioners nor the plaintiffs in *Lillebo v. Cory* are members of their recognized collective bargaining representative, California State Employees Association, a respondent in this case. Both petitioners in this case and the plaintiffs in *Lillebo v. Cory* have objected to the expenditure of fair share fees for political causes. The California law in question, however, specifically authorizes such use of dissenting nonmembers' fees. Due to the identity between the present case and *Lillebo v. Cory,* amicus curiae, H. Paul Lillebo, asserts a vested interest in the outcome of this petition.

The decision of the Ninth Circuit Court of Appeals below is extremely prejudicial to the case of amicus pending in state court. After discussing the impropriety of a preliminary injunction, the court then stated that public employee representatives should be given broad authority to lobby the state Legislature due to the fact that many negotiation matters are covered by statute. *Champion v. State of California,* 738 F.2d 1082, 1086 (9th Cir. 1984). This statement ignores Government Code § 3517.6, which states that a memorandum of understanding supersedes the statutes mentioned in the lower court's opinion. Nevertheless, this erroneous phrase surely will be cited against H. Paul Lillebo and the 209 other plaintiffs in *Lillebo v. Cory.*

Amicus contends that there is a need for additional argument in light of the erroneous holding of the Court of Appeals cited above. Due to his experience with the California collective bargaining system, amicus is uniquely qualified to point out particular aspects of this system which demonstrate that lobbying in California is not an

activity germane to the duties of the collective bargaining representative. Since this discussion indicates that Government Code § 3515.8 is unconstitutional on its face, amicus is prepared to distinguish on this basis previous decisions of this Court which do not permit preliminary injunctive relief.

For these reasons, H. Paul Lillebo requests that this motion to file the annexed brief amicus curiae be granted.

DATED: January 15, 1985.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported officially at 738 F.2d 1082 (1984).

SUMMARY OF ARGUMENT

The court below misapplied precedent in denying petitioners preliminary injunctive relief. This case does not challenge the application of agency shop fees to a particular individual; rather, this case facially challenges the substantive merits of the statute authorizing the collection of said fees. The statute is invalid on its face because it specifically authorizes collection of these compelled fees for expenditure in support of political and ideological activities. Considerations for denying preliminary injunctive relief therefore disappear.

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ARGUMENT

I

PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE WHEN A FACIAL ATTACK IS MADE ON AN AGENCY SHOP STATUTE

In denying petitioners preliminary injunctive relief, the court below relied on the holdings of this Court in *International Association of Machinists v. Street*, 367 U.S. 740, 771 (1961), and *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 120 (1963). *Champion v. State of California*, 738 F.2d at 1084-85. The lower court interpreted these cases as holding that a temporary injunction is never appropriate when challenging the constitutionality of an agency shop fee statute. Amicus asserts that the lower court erred in applying this rule to all such cases. The lower court should have distinguished between cases alleging facial unconstitutionality of the

statute and cases alleging unconstitutionality of the statute as applied.

It is significant to note that *Street* and *Allen* involved an "as applied" challenge to agency shop fees. In both cases, plaintiffs discovered that these fees were being spent for political causes and brought suit to enjoin all collection of agency shop fees. *Street*, 367 U.S. at 744-45; *Allen*, 373 U.S. at 117. This Court noted in *Street* that the plaintiffs' cause of action "stems not from constitutional limitations on Congress' power to authorize the union shop, but from [the statute] itself." *Street*, 367 U.S. at 771. Similarly, the *Allen* majority distinguished between the spending of money under the statute and the validity of the statute. *Allen*, 373 U.S. at 120. Since plaintiffs' claims in *Street* and *Allen* involved the improper implementation of the statutes in question, the granting of a preliminary injunction was held to be an inappropriate remedy. *Id.; Street*, 367 U.S. at 771.

Petitioners' claim is not based upon the mere improper expenditure of agency shop fees. Instead, petitioners allege that the statute authorizing the collection of agency shop fees for lobbying purposes (Gov't Code § 3515.8)[1] is unconstitutional on its face. Petitioners' action thus stems from the constitutional limits on the Legislature's power to authorize the agency shop, not from the illegal implementation of the statute. *Cf. Street*, 367 U.S. at 771. Due to this distinction, amicus asserts that granting a preliminary injunction in this case will not contradict prior holdings of this Court.

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[1] All statutory references are to the California Government Code unless otherwise noted.

Moreover, amicus argues that the reasons for denying temporary injunctive relief when the application of a statute may be illegal become irrelevant when the substantive validity of the statute is raised. In *Street,* this Court realized that restraining the collection of all shop fees could interfere with the proper purposes of the statute in question. *Id.* This logic presupposed a finding that the purposes of the statute are indeed proper, as this Court found in *Street. Id.* at 763-64. The present case involves claims that the purposes of Government Code § 3515.8 are improper and unconstitutional. It is well settled that an unconstitutional law is void *(Woodruff v. Parham,* 75 U.S. 123, 140 (1869)), and is considered to be not a law at all, binding no one *(Little Rock and Fort Smith Railway v. Worthen,* 120 U.S. 97, 102 (1887)). Therefore, an injunction against an unconstitutional statute does not interfere with proper purposes; rather, an injunction prevents further infringement of constitutional rights.

In light of the fact that a facial constitutional challenge has been made, equitable principles dictate that preliminary injunctive relief be granted in this case. Cases through the years have held that preliminary injunctive relief is available upon the satisfaction of four criteria: (1) the probability of success on the merits; (2) the possibility of irreparable harm to the plaintiff; and (3) the balance of hardship favoring the plaintiff. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931 (1975). The infringement of constitutional rights works an irreparable harm *(Elrod v. Burns,* 427 U.S. 347, 373-74 (1976)), and the probability of success will be demonstrated in Part II of this argument, *infra.* The most important threshold to clear, then, is a showing that the balance of hardships favors the plaintiff.

In *Street*, this Court held that this balance favored the defendant, as an injunction would interfere with legitimate functions of the union. 367 U.S. at 119-20. In the present case, petitioners claim that the agency shop fee statute is void and without effect. The defendant therefore can assert no valid interest to counter the constitutional interests of the petitioners. Since the balance of hardship must favor the petitioner, a preliminary injunction should issue.

Equitable relief is the only adequate remedy of the petitioners in this case. The statute at issue in this case specifically authorizes the employee association to use a dissenting nonmember employee's compelled fee to finance the cost of legislative lobbying, even though the employee may object to the particular cause endorsed. Gov't Code § 3515.8. The only way for petitioners to gain relief is to declare the statute unconstitutional. Denying the petitioners preliminary injunctive relief only postpones the inevitable and perpetuates the violation of the constitutional rights of petitioners. This Court recently held that even a temporary violation of the rights of dissenting employees is intolerable. *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, — U.S. —, 104 S. Ct. 1883, 1890 (1984). The case for preliminary injunctive relief becomes all the more compelling upon realization of the grievous constitutional flaws in the California statutory scheme.

II

THE CALIFORNIA COLLECTIVE BARGAINING STATUTE IS UNCONSTITUTIONAL ON ITS FACE

This Court has held on numerous occasions that expenditures of union shop fees for political causes violate the rights of those employees who do not agree with the

cause. *See, e.g., Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 104 S.Ct. at 1896; *Abood v. Detroit Board of Education,* 431 U.S. 209, 233-37 (1977); *Allen,* 373 U.S. at 118; *Street,* 367 U.S. at 768-70. The test for determining the permissibility of an expenditure is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Ellis,* 104 S.Ct. at 1892. The California statute specifically authorizes the collection and expenditure of agency shop fees from dissenting nonmembers for political purposes unrelated to the respondents' collective bargaining function. For this reason, Government Code § 3515.8 is unconstitutional on its face.

A. The California Statute Authorizes Collection and Expenditure of Agency Shop Fees for Political Activities

On its face, the California statute requires refunds of expenditures only for *partisan* political or ideological causes. Gov't Code § 3515.8. Significantly, only partisan political expenditures are included, and nonpartisan political expenditures are implicitly nonrefundable. Nonpartisan political expenditures of a dissenting nonmember employee's compelled fees are, therefore, specifically authorized by the statute.

This Court has never distinguished between partisan and nonpartisan political views. First Amendment freedoms have always been framed in terms of freedom of conscience, whether or not partisan politics are involved. *See West Virginia State Board of Education v. Barnette,*

319 U.S. 624, 642 (1943). The agency shop fee cases are no exception, as this Court recently repeated the rule that dissenting employees "could not be burdened with any part of the union's expenditures in support of *political or ideological* causes." *Ellis,* 104 S. Ct. at 1891 (emphasis added).

The California statute is underinclusive, as this law prohibits use of a dissenting nonmember's compelled fees for partisan political expenditures but specifically authorizes and encourages the use of such fees for nonpartisan political activities. The utilization of agency shop fees for political causes, partisan or nonpartisan, violates the First Amendment rights of employees who do not agree with the particular cause. *Abood,* 431 U.S. at 237. As a matter of law, Government Code § 3515.8 violates the First Amendment.

B. The California Statute Authorizes Collection and Expenditure of Agency Shop Fees for Political Lobbying Purposes

This Court held in *Abood* that compelling employees to support financially a collective bargaining representative impacts on the associational rights of the employees guaranteed by the First Amendment. *Abood,* 431 U.S. at 222-23. Yet, this interference is justified by the governmental interest in stable labor relations provided by the agency shop. *Id.* at 222-23. This interest may be advanced by expenditures of agency shop fees for activities that are "an integral part of the bargaining process." *Id.* at 236. Lobbying a legislative body to secure the approval of a collective bargaining agreement may be "germane to [a representative's] duties as a collective-bargaining representative." *Id.* at 235. The expenditure of agency shop

fees for lobbying for the expression of political views or for the advancement of ideological causes, on the other hand, is not related to the collective bargaining function and violates the First and Fourteenth Amendment rights of nonmembers. *Id.* at 235-37.

Under the California collective bargaining system, the California Department of Personnel Management is charged to serve as the representative of the Governor in negotiations with collective bargaining representatives. Gov't Code §§ 3517, 19815.4(g). When agreement is reached between the parties, the terms of the agreement are finalized in a memorandum of understanding. Gov't Code § 3517.5. While the California Legislature has provided for some terms of employment such as hours, overtime compensation, sick leave, and vacation by statute (*see* Gov't Code §§ 19844, 19851, 19856, and 19859) this same Legislature also provided that the terms of a memorandum of understanding supersede statutory provisions in the event of a conflict. Gov't Code § 3517.6. In California, then, the primary focus in the collective bargaining process is on the negotiation process between the executive branch and the employee representative.

The state Legislature plays a small role in the California system. Pursuant to the fiscal powers granted to this body by Article IV, Section 12 of the California Constitution, the approval of the state Legislature must be obtained for a memorandum of understanding if the expenditure of funds is involved. *Id.* The overriding effect of the memorandum of understanding precludes the Legislature from becoming involved in collective bargaining matters in real terms, as any statute affecting conditions

of employment will be rendered impotent by this memorandum.

From the above discussion, it is clear that lobbying the Legislature does not further the governmental interests justifying the agency shop. As this Court noted in *Abood,* the interest in stable labor relations would be advanced by expenditures of shop fees for activities that function as an integral part of the bargaining process. *Abood,* 431 U.S. at 222-23, 236. In California, the bargaining process centers on the Director of the Department of Personnel Administration and the employee representative. Gov't Code §§ 3517, 19815.4(g). The agreement reached between the parties supersedes most statutory provisions pertaining to public employment. Gov't Code § 3517.6. Due to this fact, there is no need to lobby the Legislature to pass legislation regarding employment terms, as a subsequent memorandum of understanding may render this legislation ineffectual. Consequently, any lobbying effort which is not related to securing the approval of a bargaining agreement by the Legislature is not an integral part of the bargaining process and does not advance the governmental interest justifying the agency shop. Yet, the California statute forces employees to contribute towards lobbying efforts purporting to secure benefits "in addition to those secured through meeting and conferring with the state employer." Gov't Code § 3515.8. Therefore, compelling an employee to support such lobbying violates the First Amendment rights of association of the employee. Amicus thus argues that Government Code § 3515.8 violates the First and Fourteenth Amendments to the United States Constitution on its face.

This Court stated in *Abood* that the expenditure of agency shop fees for the expression of political or ideological goals violates the First Amendment. *Abood,* 431 U.S. at 235-37. Under the statute at issue, petitioners are compelled to support financially lobbying efforts aimed at achieving the policy goals of the collective bargaining representative. A collective bargaining representative may have many policy goals which are political or ideological in nature. *Abood,* 431 U.S. at 222. A recent example would be in the pay equity area, where collective bargaining representatives have sued governmental entities over the implementation of comparable worth. *See, e.g., American Federation of State, County, and Municipal Employees v. State of Washington,* 578 F. Supp. 846 (W.D. Wash. 1983). As this Court has noted, comparable worth is a controversial topic. *County of Washington v. Gunther,* 452 U.S. 161, 166 n.6 (1981). Under California law, employees opposing comparable worth could be forced to support financially lobbying designed to effectuate a policy in favor of this concept.

There are other controversial political or ideological issues which a collective bargaining representative could lobby for as a policy goal: affirmative action, medical coverage for abortion, and preferential seniority systems. As this Court stated in *Abood,* the mere expression of political views by an exclusive representative does not infringe on constitutional rights. *Abood,* 431 U.S. at 235. However, financing any such expression with moneys paid by objecting employees as a condition of employment does violate the First Amendment. *Id.* at 235-36. Since the California statute authorizes fair share fees to be spent to lobby for political or ideological policies, Government Code § 3515.8 violates the First Amendment on its face.

CONCLUSION

Denying preliminary injunctive relief to the petitioners serves no valid interests. Blind application of the rule expressed in *Street* deprives petitioners of their constitutional rights by permitting the collective bargaining representative to lobby for any desired policy goal until a final judgment is rendered. If lengthy appeals are involved, the employee's rights could be infringed for a number of years. The concerns of this Court in *Street* regarding the continued functioning of the collective bargaining system are not involved in the present controversy. The only interest served by denial of a preliminary injunction is the interest of the collective bargaining representative which is allowed to use compelled fees to lobby for political and ideological policy goals a result which is *a fortiori* violative of the petitioners' First Amendment rights. For these reasons, amicus H. Paul Lillebo urges this Court to grant a writ of certiorari to the Court of Appeals for the Ninth Circuit and decide this case in favor of petitioners.

DATED: January, 1985.

Respectfully submitted,

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